STRADLEY RONON

Client Alert

A Publication of the Stradley Ronon
Investment Management Group

WWW.STRADLEY.COM

NOVEMBER 26, 2019

Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware

SEC Proposes to Modernize the Advertising and Cash Solicitation Fee Rules for Investment Advisers

On November 4, 2019, the Securities and Exchange Commission (the "SEC") proposed amendments to its investment adviser advertising and cash solicitation fee rules under the Investment Advisers Act of 1940 (the "Advisers Act"), as well as related amendments to its investment adviser books and records rule and registration form (collectively, the "Proposals").[1] Specifically, the Proposals seek to amend Rule 206(4)-1, which governs how a registered investment adviser can market its products and services (the "Advertising Rule"); Rule 206(4)-3, which regulates an adviser's cash solicitation fee arrangements (the "Solicitor Rule"); Rule 204-2, which sets forth an adviser's books and records and obligations (the "Books and Records Rule"); and Form ADV, the adviser registration and disclosure form.

The current Advertising Rule and Solicitor Rule have remained largely unchanged since their adoption in 1961 and 1979, respectively. The SEC states in its release containing the Proposals (the "Proposing Release") that they are principally designed to bring the rules and disclosure form up to speed with current industry practices and technological advancements.

This alert provides an overview of the Proposals and discusses how an investment adviser's existing regulatory obligations pertaining to advertising and the payment of cash solicitation fees would be altered if the Proposals are adopted. Part I discusses the proposed amendments to the Advertising Rule, and Part II discusses the proposed amendments to the Solicitor Rule.

The proposed amendments relating to the Advertising Rule are numerous and substantive, and go well beyond mere updates. They would include the following:

- Significantly expand the definition of "advertisement" to include online communications, third-party communications disseminated "by or on behalf of" an adviser, and private fund marketing materials.
- Permit the use of client testimonials, non-client endorsements and third-party ratings, subject to certain enumerated conditions.
- Impose substantive conditions on advertisements that present actual or hypothetical investment performance (including model, target and projected performance).
- In certain instances, such as the presentation of gross-of-fee investment performance, impose regulatory conditions on advertisements distributed to retail investors that are more extensive than those provided solely to non-retail investors.
- Require a designated employee of an adviser to review and approve each advertisement, other than certain excluded communications, prior to distribution.

The proposed amendments to the Solicitor Rule are also significant, and would include the following:

- Encompass non-cash compensation arrangements.
- Apply to private fund investor solicitation arrangements.
- Eliminate the current requirement that the solicitor provide a copy of the adviser's Form ADV Part 2A to solicited prospects.
- Ease the solicitor's brochure delivery requirement in connection with certain mass solicitations.
- Revise and expand the list of disciplinary events that disqualify a solicitor from receiving compensation.

Part I – Proposed Amendments to the Advertising Rule

The Advertising Rule currently prohibits all investment advisers registered, or required to be registered, with the SEC from distributing, directly or indirectly, advertisements that contain any of the following:

1. Testimonials of any kind concerning the adviser's advisory services;
2. Past specific recommendations of an investment adviser that were or would have been profitable;
3. Charts and graphs to help investors decide which securities to buy or sell, without prominently disclosing the limitations of such material;
4. Offers to provide reports or services free of charge unless such reports or services are actually free; and
5. Untrue statements of material fact, or otherwise false or misleading statements of material fact.

If you would like more information, contact:

Lawrence P. Stadulis
lstadulis@stradley.com
202.419.8407

Matthew R. DiClemente
mdiclemente@stradley.com
215.564.8173

Nicole M. Kalajian
nkalajian@stradley.com
312.964.3507

Sara P. Crovitz
scrovitz@stradley.com
202.507.6414

David F. Roeber
droeber@stradley.com
856.321.2411

Michael P. Wallace
mwallace@stradley.com
202.507.6400

The proposed amendments would restructure and expand the Advertising Rule to five main subsections: (1) definitions; (2) general prohibitions; (3) testimonials, endorsements and third-party ratings; (4) performance information; and (5) review and approval. A brief overview of each subsection follows.

Definitions

The definitions subsection would define key terms used throughout the Advertising Rule. Without a doubt, the most important of these terms is "advertisement." The proposed amendments would substantially expand the scope of this defined term to include the following types of communications that promote an adviser's investment advisory services to prospective and existing customers: oral communications; online communications; communications to a single person; communications to private fund investors; and communications by or on behalf of an adviser. By focusing this definition on the goal of the communication, not the method of delivery, the SEC expects the proposed definition to be flexible enough to keep pace with advancing technology and evolving industry practices.

The Proposing Release indicates that the inclusion of private fund communications was intended to supplement and enhance the prohibitions from making misleading statements to private fund investors under Rule 206(4)-8.[2] Thus, private fund communications would be subject to both the Advertising Rule and Rule 206(4)-8.

The expanded definition of advertisement would include not only communications that an adviser disseminates, but also communications that some other party distributes "by or on behalf" of the adviser. The Advertising Rule would not expressly define this phrase, but the Proposing Release indicates that it would encompass adviser-authorized communications made by intermediaries, such as consultants and solicitors, as well as adviser affiliates. The Proposing Release also discusses in some detail the circumstances under which communications by unaffiliated third-parties could be considered by or on behalf of an adviser.[3]

The proposed amendments to the Advertising Rule would expressly exclude the following four types of communications from the definition of advertisement: (1) non-broadcast live oral communications; (2) communications responding to unsolicited requests for information about the adviser or its services, other than communications to retail persons, including performance results or communications to anyone that include hypothetical performance; (3) an advertisement about a registered investment company or public business development company that is within the scope of Rule 482 or Rule 156 under the Securities Act of 1933; and (4) any information required to be contained in a regulatory notice, filing or other communication.

General Prohibitions

The proposed general prohibitions subsection of the Advertising Rule contains an expanded and enhanced list of general advertising prohibitions. Violations of these provisions can rest on a finding of mere negligence; proof of scienter would still not be required. This subsection includes the following new prohibitions:

1. **Unsubstantiated claims.** Unsubstantiated material claims or statements, such as exaggerated statements about an adviser's skill or experience. This prohibition is designed to prohibit the same conduct currently prohibited regarding the use of charts and graphs in advertisements, but is broader in scope to prevent other misleading advertisements, such as guaranteed returns and unsubstantiated statements about an adviser's skill or experience.

2. **Untrue or misleading implications or inferences.** This prohibition is aimed at advertisements that are likely to cause misleading inferences to be drawn by an investor regarding some material fact about the adviser. The Proposing Release notes examples of advertisements that could present a true statement of fact in materially misleading ways.[4] For instance, it would be misleading for an advertisement to include a single investor testimonial stating that an investor's account was profitable, which may be factually true, if the investor's results were atypical among all the adviser's investors.

3. **Failing to disclose risks and limitations.** Failing to clearly and prominently disclose any material risks or other limitations when advertising the benefits of an adviser's services. The proposed amendments to the Advertising Rule do not specifically address the circumstances under which disclosures will be deemed "clear and prominent" for purposes

of this prohibition. The SEC does state in the Proposing Release, however, that what is considered clear and prominent may vary by type of advertising medium. However, merely including a hyperlink to risks within an online advertisement would not be sufficient.

4. **Cherry-picking.** Referencing specific investment advice that is not presented in a fair and balanced manner. This provision is principally concerned with an adviser "cherry-picking" and presenting in a misleading manner favorable aspects of its investment advice, including but not limited to past and current profitable securities recommendations. The SEC states in the Proposing Release that what is "fair and balanced" will depend on the specific facts and circumstances.

It is important to note that these general prohibitions are in addition to the proposed amendments, discussed below, relating to testimonials, endorsements, third-party ratings and performance results. Thus, for example, an advertisement containing a testimonial satisfying the proposed testimonial-related provisions of the Advertising Rule would still violate the Advertising Rule if it violated one or more of the general prohibitions discussed above.

Testimonials, Endorsements and Third-Party Ratings in Advertisements

The proposed amendments to the Advertising Rule would permit the use of testimonials, which are currently prohibited, and permit non-client endorsements and third-party ratings, which are not addressed by the current rule. The proposed definitions of "testimonials" and "endorsements" are broad and capture all advertisements containing any direct or indirect approval, support, recommendation or experience by clients or investors in connection with an adviser's advisory services. Third-party ratings are defined in the proposed Advertising Rule as ratings provided by a non-related person who provides such ratings in the ordinary course of business. The Proposing Release states that the ordinary course of business requirement is intended to relate to persons with experience developing and promoting ratings, and would distinguish third-party ratings from testimonials and endorsements.[5]

Under the proposed amendments, advertisements containing testimonials, endorsements or third-party ratings must satisfy certain disclosure and other conditions intended to alert recipients to any relationship with the adviser, compensation received by the author and related conflicts of interest. As a result, for testimonials and endorsements, a disclosure must be provided as to who provided the recommendation and whether such person was compensated for the recommendation (including non-cash compensation). Third-party ratings must be accompanied by prominent disclosure of the date the rating was made, the period of time the rating is based upon, and the party who is providing the rating. Although the Proposing Release indicates that third-party statements or ratings hosted on third-party platforms generally will fall outside the scope of the Advertising Rule, the Proposing Release cautions that such a determination requires an analysis of the facts and circumstances.[6] To use third-party ratings, the adviser must also reasonably believe that the questionnaire used to generate the rating makes it equally easy to provide positive and negative ratings and was not prepared to solicit certain results.

Testimonials, endorsements and third-party ratings that are not themselves "advertisements" or appear within an advertisement will not be subject to the Advertising Rule. However, if the adviser takes steps to influence reviewers or commentary, such as preparing, editing, prioritizing or paying for the content, then this would bring the materials under the scope of the Advertising Rule because such content would be "by or on behalf of" the adviser.

Performance Information

The performance information subsection identifies six types of performance information that advisers may include in their advertisements: (1) net performance; (2) gross performance; (3) related performance; (4) extracted performance and (5) hypothetical performance. It also sets forth the specific conditions that must be met depending on the type of performance that is presented and the nature of the audience. In this connection, the subsection distinguishes between non-retail advertisements and retail advertisements. A "non-retail advertisement" is defined, essentially, as any advertisement that is disseminated solely to a "qualified purchaser," as defined in Section 2(a)(51) of the Investment Company Act of 1940 (the "1940 Act"), or a "knowledgeable employee," as defined in Rule 3c-5 under the 1940 Act. A "retail advertisement" is any advertisement that is not a non-retail advertisement. An adviser that seeks to publish a "non-retail advertisement" will be required to adopt and implement policies and procedures reasonably designed to ensure dissemination only to qualified purchasers and knowledgeable employees. The adviser must also periodically review the adequacy of this policy.

Each type of performance information that advisers would be permitted to include in their advertisements, and the applicable conditions that must be met, are briefly discussed below.

1. **Net Performance.** "Net performance" would be defined as the performance results of an account or portfolio after the deduction of all fees and expenses that a client or investor has paid or would have paid an adviser for its investment advisory services. While no particular methodology is prescribed for calculating net performance, the proposed rule contains a list of recommended fees and expenses to be considered, such as direct advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser.

   The proposed amendments to the Advertising Rule would, effectively, require all retail advertisements containing performance information to include net performance. The net performance would have to be presented for one-, five- and ten-year periods, each with equal prominence and ending on the most recent practicable date. This net performance presentation requirement essentially codifies the SEC staff's long-standing position in *Clover Capital Management, Inc.* (Oct. 28, 1986). Significantly, this requirement would not apply to non-retail advertisements, including those for private funds excluded under Section 3(c)(7) of the 1940 Act.

2. **Gross Performance.** "Gross performance" is defined as the performance results of an account or portfolio that is presented before the deduction of all fees and expenses charged for the provision of investment advisory services. The proposed amendments to the Advertising Rule would require all advertisements containing gross performance to provide or offer to provide promptly a schedule of the specific fees and expenses (presented in percentage terms) deducted to calculate net performance. Retail advertisements could not include gross performance unless equally prominent net performance accompanies it. The accompanying gross performance must be calculated over the same time period as the net performance using the same methodology.

3. **Related Performance.** "Related performance" would be defined as the performance results of one or more portfolios with substantially similar investment policies, objectives and strategies as those of the services being offered or promoted in the advertisement. The proposed amendments to the Advertising Rule would prohibit the presentation of related performance in an advertisement without including all portfolios with substantially similar investment policies, objectives and strategies, unless the advertised performance is no higher than if all related portfolios had been included. Such requirements seek to prevent an adviser from selectively excluding poor performing portfolios that are similarly managed. The adviser also cannot exclude performance information if such exclusion would alter the Proposals' prescribed time periods. The adviser would be permitted to present related performance information on a portfolio-by-portfolio basis or as composites. It should be noted that the Financial Industry Regulatory Authority ("FINRA") does not currently allow related performance to be included in advertisements to retail investors.

4. **Extracted Performance.** "Extracted performance," which is also often referred to as carveout performance, would be defined as the performance results of a subset of investments extracted from a portfolio. The proposed amendments to the Advertising Rule would prohibit the presentation of extracted performance, unless the advertisement provides or offers to provide promptly the performance results of all investments in the portfolio from which the performance was extracted.

5. **Hypothetical Performance.** Finally, "hypothetical performance" would be defined as performance results that were not actually achieved by any portfolio of any client of the investment adviser. This defined term would include, but not be limited to, the following: (1) performance derived from representative model portfolios that are managed contemporaneously alongside portfolios managed for actual clients; (2) backtested performance; and (3) targeted or projected performance. Since hypothetical performance is perceived as carrying a higher risk of being misleading, if an adviser decides to provide hypothetical performance, it must adopt policies and procedures reasonably designed to ensure that such information is disseminated only to persons for which it is relevant to their financial situation and investment objectives. Sufficient information must also be provided so that the recipient can understand the criteria and assumptions in calculating the performance, as well as the risks and limitations of such performance information (although only an offer to provide such information promptly is required in the case of a non-retail investor). Note that FINRA currently prohibits hypothetical backtested performance in "retail communications," as that term is defined in Conduct Rule 2210.

The Proposals also provide guidance with regard to the portability of performance. For instance, where an adviser wishes to use the performance results in its advertisement from a predecessor firm or from personnel that have joined the adviser from a different firm, it must disclose that the predecessor performance was achieved by a different firm or by personnel from a different

firm to make the advertisement not misleading. In addition, an advertisement may be misleading if the personnel that joined the adviser were not primarily responsible for the predecessor performance. While an adviser must maintain books and records required to substantiate performance, the SEC recognized that documentation related to predecessor performance may be unavailable to an adviser, and asked for comment as to whether the rule should permit other forms of verification (e.g., using publicly available contemporaneous information).

Review and Approval of Advertisements

Except as noted below, the proposed amendments to the Advertising Rule would require that an advertisement be reviewed, approved and determined to be in compliance with the Advertising Rule by a designated employee of the adviser before the advertisement could be disseminated. The Proposing Release indicates that the designated reviewer should be competent and knowledgeable, and the SEC expects that the designated employee should generally include legal or compliance personnel of the adviser. The proposed Advertising Rule would not permit the designated reviewer to be an outside third-party, such as a compliance consultant or law firm, but the Proposing Release asks for comment on this limitation.

Preapproval would not be required, however, for the following two types of communications:

- **Communications to individual persons.** Communications to a single person, household or private fund investor would not require preapproval. However, an adviser cannot seek to utilize this exemption by customizing a template presentation or mass mailing and then simply filling in different investor names or other basic client details; and

- **Live oral communications.** Live oral communications that are broadcast over television, the internet or other similar media would not require preapproval. However, if a live communication is recorded, then approval would be required prior to a distribution.

Books and Records

The Proposals would amend the Books and Records Rule in light of the proposed amendments to the Advertising Rule. Thus, among other things, the Books and Records Rule would be amended to require an adviser to make and keep copies of all communications sent to one or more persons. Currently, this requirement applies only to communications sent to 10 or more persons. In addition, it would require an adviser to maintain copies off all third-party questionnaires and surveys used to create third-party ratings. Finally, an adviser would be required to keep and maintain those records necessary to demonstrate the calculations of the various types of performance information discussed above, such as hypothetical performance.

Amendment to Form ADV

The Proposals would amend Form ADV to require an adviser to report additional information about its advertising activities. Specifically, five new "yes/no" questions would be added to Part 1A of Form ADV, which would request information about an adviser's use of advertisements that contain performance results, testimonials, endorsements, third-party ratings and its previous investment advice. The SEC would use this information to help prepare for examinations of advisers.

Advertising Rule's Harmonization With Other Regulators

While the proposed amendments would bring investment advisers closer in line with the principles-based advertising regime of other regulators, such as the Commodity Futures Trading Commission (the "CFTC") and the National Futures Association (the "NFA"), an adviser that is also registered as a commodity pool operator and/or commodity trading advisor should note that compliance with the amended adviser advertising rule, as proposed, may not satisfy its obligations under similar CFTC and NFA rules. The proposed Advertising Rule is also different from the obligations imposed on broker dealers by FINRA, which may create compliance challenges for dual-registrants and broker dealers seeking to advertise pooled investment vehicles.

Part II – Proposed Amendments to the Solicitor Rule

The existing Solicitor Rule sets forth the conditions under which a registered investment adviser may compensate related and unrelated third-party solicitors for prospective client referrals. The rule prohibits cash payments to persons subject to certain specified legal and disciplinary actions ("Disqualifying Events"). The term "solicitor" is defined broadly to include "any

person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser."

All solicitor arrangements currently must be memorialized in a written agreement between the adviser and solicitor (the "Solicitor Agreement"). The Solicitor Agreement must obligate any solicitor, other than one who is an officer, director, employee or control affiliate of the adviser, to provide each client prospect, at the time of solicitation, with a copy of the adviser's Form ADV, Part 2A (the "Adviser Brochure") and a separate written disclosure document concerning the solicitor arrangement (the "Solicitor Disclosure"). The Solicitor Disclosure must contain specified types of information about the arrangement, including the name of the solicitor, the name of the adviser, the nature of the relationship between the parties and the terms of compensation. Finally, the adviser must receive from the client prospect, prior to, or at the time of, entering into any advisory contract, a signed and dated acknowledgment of receipt of the Adviser Brochure and Solicitor Disclosure.

The Proposals would amend the Solicitor Rule in several important areas, briefly discussed below.

Definition of Solicitor

The proposed amendments to the Solicitor Rule would expand the definition of "solicitor" to also include any person who solicits prospective or existing private fund investors, as opposed to only advisory clients. Although not addressed directly in the proposed amendments, the Proposing Release also discusses the circumstances under which a person receiving compensation for providing testimonials or endorsements in an adviser's advertisements would be deemed a solicitor. The Proposing Release further notes that, depending on the facts and circumstances, a solicitor may also meet the Advisers Act's definition of "investment adviser," and, therefore, have to register with the SEC under the Advisers Act, absent an available exemption from registration.

Permissible Compensation

The Solicitor Rule would be expanded to cover solicitation arrangements involving all forms of compensation rather than only cash compensation. Non-cash compensation would include, but not be limited to, directed brokerage; sales awards or other prizes; training or education meetings; outings, tours or other forms of entertainment; and free or discounted advisory services. The Proposing Release states that compensation "could also include the adviser providing investment advice that directly or indirectly benefits the solicitor." For example, if the solicitor is a broker-dealer or affiliated with a broker-dealer, an adviser's payment for solicitation could be the adviser's recommendation that its investors purchase the solicitor's proprietary investment products or products that the adviser knows have revenue sharing or other pecuniary arrangements with the solicitor or its affiliates.

Solicitor Agreement

The proposed amendments to the Solicitor Rule would alter the requirements relating to the Solicitor Agreement in certain key respects. Specifically, an adviser would no longer be required to enter into a Solicitor Agreement with its officers, directors, employees and control affiliates ("Solicitor Affiliates"), provided that (1) the Solicitor Affiliate's affiliation with the adviser is readily apparent and (2) the adviser documents the Solicitor Affiliate's status at the time it enters into the solicitation arrangement ("Solicitor Affiliate Conditions").

In addition, the solicitor would no longer be required to deliver the Adviser Brochure under the terms of the Solicitor Agreement. The Solicitor Disclosure would still need to be delivered at the time of solicitation, except in connection with solicitations made through mass communications, where delivery must be made as soon as reasonably practicable. Either the adviser or the solicitor could agree to deliver the Solicitor Disclosure under the terms of the Solicitor Agreement.

The information that must be contained in the Solicitor Disclosure would largely remain the same, with two exceptions. First, the Solicitor Disclosure would have to disclose any potential material conflicts of interest on the part of the solicitor resulting from the investment adviser's relationship with the solicitor and/or the compensation arrangement. Second, it would have to disclose the amount of any additional cost to the investor as a result of solicitation.

Adviser Oversight of Solicitor

An adviser would be required to have a reasonable basis for believing that the solicitor has complied with the terms of the

Solicitor Agreement. Whether an adviser satisfies this "reasonable basis" requirement would depend on the circumstances. The SEC states in the Proposing Release, however, that "a reasonable basis generally should involve periodically making inquiries of a sample of investors referred by the solicitor in order to ascertain whether the solicitor has made improper representations or has otherwise violated" the Solicitor Agreement. The proposed amendments would omit Solicitor Affiliates from this solicitor oversight requirement, provided that the Solicitor Affiliate Conditions are met.

Disqualifying Events

The proposed amendments to the Solicitor Rule would revise the provisions relating to Disqualifying Events. Specifically, they would reorganize the list of Disqualifying Events and add certain new legal and disciplinary proceedings to this list. In addition, an adviser would be required to exercise reasonable care in determining that a solicitor is not subject to a Disqualifying Event and thus prohibited from receiving compensation. This reasonable care standard would continue to apply throughout the term of the solicitation arrangement. It is important to note that the Disqualifying Event provisions would continue to apply to Solicitor Affiliates. Moreover, the proposed amendments would provide a conditional exemption from the Disqualifying Event provisions for certain SEC administrative actions, including proceedings under Section 9(c) of the 1940 Act and those proceedings that are not, themselves, Disqualifying Events.

Exemptions

The proposed amendments would exempt from the Solicitor Rule certain charitable programs and arrangements under which a solicitor has received $100 or less in compensation over the preceding 12 months.

Books and Records

The proposed amendments to the Solicitation Rule would be accompanied by corresponding amendments to the Books and Records Rule to require investment advisers to make and keep records of (1) copies of the Solicitor Disclosure delivered to investors, (2) any communication or other document related to the investment adviser's determination that it has reasonable basis for believing that any solicitor it compensates under the Solicitor Rule has complied with the Solicitor Agreement, and that such solicitor is not an ineligible solicitor and (3) a record of the names of all solicitors who are an adviser's partners, officers, directors or employees, or other affiliates.

Existing SEC Staff Guidance

The Proposing Release notes that various no-action letters and other guidance addressing the application of the advertising and solicitation rules issued by the staff of the SEC's Division of Investment Management (the "Division") are under review for withdrawal (or for withdrawal with respect to a certain topic) in connection with the potential adoption of the amendments. More than 180 letters have been identified for review (including almost 100 "bad actor" letters issued under the Solicitor Rule). A number of notable letters are also specifically discussed in the Proposing Release.[7] The SEC has requested that interested parties identify additional letters for potential withdraw.

Public Comment Period

The public comment period will remain open for 60 days following publication of the Proposing Release in the Federal Register. The Division has recently been focused on expanding the views considered in the rulemaking comment process, and asset managers and industry participants of all sizes are encouraged to comment on the Proposal.[8] The SEC is also soliciting information from investors about the Proposals via Appendix B of the Proposing Release, titled "Investor Feedback."

The SEC indicated that, should the Proposals be adopted, advisers and their solicitors would have one year to comply with the new rules.

---

[1] *Investment Adviser Advertisements; Compensation for Solicitations*, Investment Advisers Act Release No. IA-5407 (Nov. 4, 2019).

[2] *See* Proposing Release, p. 35 (noting there may be some overlap between the prohibition in Rule 206(4)-8 and the proposed Advertising Rule).

[3] *See* Proposing Release, pp. 24-28.

[4] *See* Proposing Release, pp. 57-59.

[5] *See* Proposing Release, pp. 80-81.

[6] *See* Proposing Release, p. 81.

[7] *See, e.g.*, Investment Adviser Association, SEC No-Action Letter (Dec. 2, 2005); TCW Group, SEC No-Action Letter (Nov. 7, 2008); Investment Counsel Association of America, Inc., SEC No-Action Letter (Mar. 1, 2004); Horizon Asset Management, LLC, SEC No-Action Letter (Sept. 13, 1996); Munder Capital Management, SEC No-Action Letter (May 17, 1996); Clover Capital Mgmt., Inc., SEC No-Action Letter (Oct. 28, 1986).

[8] Comments can be submitted via the SEC's internet comment form (*available at* http://www.sec.gov/rules/proposed.shtml) or by sending an email to rule-comments@sec.gov with "File Number S7-21-19" in the subject line.